No. 3975

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM FISHER, Supervising Inspector for the Eleventh District of Steamboat Inspection Service, Department of Commerce of the United States, and DONALD AMES and HARRY C. LORD, Local Inspectors Steamboat Inspection Service, Department of Commerce of the United States,

Appellants,

vs.

JOHN ALWEN,

Appellee.

HON. JEREMIAH NETERER, *Judge.*

BRIEF OF AMICUS CURIAE

MacCORMAC SNOW,
Solicitor for United States Shipping Board, Appearing as Amicus Curiae.
502 Platt Bldg., Portland, Oregon.

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BRIEF OF AMICUS CURIAE

It is learned that no brief will be filed on behalf of Captain Alwen. Accordingly this brief will be made more complete than was originally intended. In spite of a somewhat bulky record the controlling

facts may be stated in a small compass.

April 1, 1921, the steamship "West Hartland," Captain John Alwen on her bridge and in charge of navigation, collided with the S. S. "Governor" in the waters of Puget Sound, sinking the latter. A day or two later Captains Ames and Lord, Local Inspectors, commenced a preliminary investigation at which the officers of the two vessels were examined. April 16, 1921, the Local Inspectors published findings holding certain officers of the "Governor" responsible for the collision and finding with respect to Captain Alwen that "he is absolved from all blame." (Record 14.) *No charges were then or thereafter preferred against him by the Local Inspectors.*

May 16, 1921, Captain Fisher, Supervising Inspector, sent Captain Alwen a letter by mail (Record 67) charging him with negligence in connection with the collision and adding "at your earliest convenience you are directed to appear at this office to make answer to these charges. You may be represented by counsel if you so desire."

Captain Alwen appeared in response to this summons, represented by Frank C. Reagan, Esq., his attorney. A trial was had commencing about May 20th and ending July 22nd (Record 145), several postponements and continuances intervening. At the conclusion of the testimony against Captain Alwen his attorney made an objection challenging the

right of Captain Fisher under the law to conduct the trial. (Record 161.) This objection was overruled, and the trial proceeded. (Record 178.) Captain Alwen put in his testimony and his attorney filed a brief on his behalf. On July 22, 1921, the Supervising Inspector held (Record 70) that Captain Alwen was guilty of negligence, inattention and unskilfulness, in connection with the collision, and further (Record 80),

> "his license as master and pilot, No. 73609, issue No. 5, dated December 2, 1918, is hereby suspended for a period of two years from this date, July 22, 1921. Captain Alwen is directed to deposit his license with the United States Local Inspectors at Seattle, where it will remain during the period of his suspension."

Captain Alwen prosecuted an appeal to the Supervising Inspector General,who on August 2, 1921, affirmed the decree of the Supervising Inspector. (Record 191.)

September 7, 1921, Captain Alwen exhibited his bill in the District Court, praying that the enforcement of Captain Fisher's judgment be restrained on the ground that the trial by him was without warrant of law. An amended complaint (Record 52) was filed, upon which issue was joined, and a trial had, resulting in a decree by Judge Neterer (Record 113) dated February 21, 1922, enjoining the enforcement of the Supervising Inspector's de-

cision. From this decree the present appeal has been prosecuted.

The important question involved is the legality of the trial by Captain Fisher. If this is shown to have been without warrant, we take it that in entering a Federal Court of Equity Captain Alwen chose the proper remedy. *Joyce v. Bulger,* 240 Fed. 817; *Fredenberg v. Whitney,* 240 Fed. 819; *Bulger v. Benson,* 262 Fed. 929.

The officers making up the Steamboat Inspection Service consist of the Local Inspectors, Supervising Inspectors, and Supervising Inspector General. An examination of the statutes (R. S. 4416 *et seq.*)indicates that their duties are *quasi* judicial

Under Section 4450 the Local Board of Inspectors are authorized and required to investigate all acts of incompetency and misconduct by licensed officers and, for this purpose, to compel attendance of witnesses and administer oaths. No similar powers of investigation are given to the Supervising Inspectors or any other officers of the service. If the local boards shall be satisfied that an officer under investigation has been guilty of misbehavior, negligence, or unskilfulness, they are required to suspend or revoke his license. This proceeding has in it the principal elements of a criminal trial before a court of original jurisdiction.

The investigation by the Local Inspectors to determine the causes of the "West Hartland-"Gov-

ernor" collision (Record 140) bore some similarity to a preliminary investigation or that of a grand jury. Its result as to Captain Alwen was analogous to finding a not true bill. We cannot find a statute or regulation expressly authorizing this investigation. However, the practice has long been followed and is not objected to in this case. The important fact is that *no charges were filed against Captain Alwen by or with the Local Inspectors.*

Section 4452 formerly provided for an appeal to the Supervising Inspector of the district by any person deeming himself wronged by a decision of the Local Inspectors, and provided for a similar appeal from a decision of a Supervising Inspector to the Supervising Inspector General. But peculiarly, this section gave no appeal to the Government. When the *Lackawanna* was sunk with two lives lost, through negligence of licensed officers, the Local Inspectors imposed a ridiculously low sentence and the Government was without remedy. (Record 101.) Accordingly the Act of June 10, 1918 (1918 Sup. F. S. A. 829) was passed.

Section I of this Act permits any person directly interested in or affected by any decision or action of any Board of Local Inspectors, who shall feel aggrieved by such decision, to appeal to the Supervising Inspector of the district; and permits a like appeal from any decision or action of any Supervising Inspector to the Supervising Inspector General. The decision of the latter, when approved by

the Secretary of Commerce, is made final. Application for re-examination by a Supervising Inspector or by the Supervising Inspector General is required to be made within thirty days after the decision or action appealed from. Officers may be represented by counsel.

Section II provides that any Supervising Inspector may, within thirty days after a decision by the Local Inspectors, review the same; and in a like manner the Supervising Inspector General may within thirty days review any decision of any Supervising Inspector. The decision of the Supervising inspector General, when approved by the Secretary of Commerce, is final.

Section III provides that any decision so reviewed by any Supervising Inspector, or the Supervising Inspector General, may be revoked, changed or modified by such reviewing officer, who shall have the usual powers with respect to administering oaths and compelling attendance of witnesses.

Section IV permits the Secretary of Commerce to make proper regulations under the Act. Section V repeals the defective R. S. 4452.

Regulations made under the Act provide as follows: (General Rules and Regulations prescribed by Board of Supervising Inspectors, amended January, 1922; Edition of April 7, 1922, page 168.)

> "The Supervising Inspector, upon notice of an appeal from the decision of the Local Board, provided said notice of appeal shall be made

> within thirty days from the date of the decision of the Local Board, shall give notice in writing to said Local Board to forward a certified copy of their decision, together with the charges and all evidence in writing on file in their office."

On its face the action of the Supervising Inspector in the present case appears irregular and not in accord with the ordinary rights of a person accused of a crime or sought to be penalized. *Captain Alwen was never tried in the equivalent of a court of original jurisdiction.* He appeared and testified at a preliminary hearing and his next notice of any proceedings against him came in the form of charges preferred in the equivalent of an intermediate appellate court. It is taken for granted that this Court will not approve procedure of this sort unless compelled to by an unambiguous and unequivocal requirement of the Act of June 10, 1918.

But the Act of June 10, 1918, is not ambiguous with respect to the present controversy, and the regulations quoted above are well within the spirit and intention of the Act. The Act, by its title, is to "provide for appeals from decisions from Boards of Local Inspectors of Vessels and for other purposes." *Nowhere in the Act can be found any authorization of an original investigation, trial, or other original proceeding.*

The word "appeal" is used throughout the Act. This word has two meanings, each of them well defined. Technically it means a review by a higher

court of a decision of a lower court, through the Civil Law process of a trial *de novo*. *Wiscart v. Douchy,* 3 Dal. 321, 327. In its less technical sense the word denotes such review, generally. We doubt whether the word, as used in the Act of June 10, 1918, was employed other than with a view to its technical and exact meaning. However, it is unnecessary for the Court to decide now which meaning is intended. The point is that the Act relates to review by the equivalent of a higher court and nothing else.

In the present case there was no appellate review. Captain Lord testified: (Record 139.)

> "Capt. Fisher, as Supervising Inspector, never asked the Local Board to correct its findings and decisions. Nor did he ever ask the Local Board to explain its findings and decisions; only in conversation. He made no request for any explanation or correction. Capt. Fisher never filed any charge with the Local Board against Capt. Alwen on account of this collision. At the time the local hearing was had there were no charges then pending before the Local Board against Capt. Alwen. Captain Alwen appeared before the Local Board as a witness only. The Local Board furnished Capt. Fisher a certified copy of this hearing.
>
> "Q. 'Since this case was begun has Capt. Fisher as Supervising Inspector, or the Supervising Inspector General, filed with your Local Board any order or decision tending to affect, or change, or modify, your finding or decision

as to Capt. Alwen?'

"A. 'None whatever'."

The only statute authorizing the investigation of the conduct of licensed officers is R. S. 4450 above referred to. This section provides for such investigation by the Local Boards of Inspectors and not by any other officials. The proceeding complained of against Captain Alwen is entitled, "In the Matter of Charges preferred by the United States Supervising Inspector, 11th District, against Capt. John Alwen, etc." (Record 70.) Neither R. S. 4450 nor any other statute authorizes the Supervising Inspector to prefer charges. Consequently the proceedings instituted by Captain Fisher are void and were properly enjoined.

It is contended on behalf of Captain Fisher that proceedings instituted by him were really in the nature of appellate proceedings; that a certified copy of the record of the preliminary investigation by the Local Board was furnished him (Record 140); that during the thirty days following the decision of the Local Board, he reviewed this record, and that the charges preferred by him against Captain Fisher in effect brought the case before him for review. (Record 143.)

There are two principal answers to this contention: First, there was never any case to appeal, for the reason that Captain Alwen was never brought to trial before the Local Inspectors; and secondly,

even if there had been a case to appeal, the procedure adopted by Captain Fisher would have ben improper under the Act of June 10, 1918.

The first objection to the procedure untaken by Captain Fisher is too clear to require further comment. An appeal naturally presupposes something to appeal from. Where no proceeding is instituted, no trial had, and no judgment entered, there naturally can be no appeal. As to the second objection, no question is raised of the power of the Supervising Inspector to review the decision of the Local Inspectors exonerating Captain Alwen, but he could only do so in accordance with the procedure laid down by the statute and regulations, namely, by giving notice in writing to the Local Board to furnish a certified copy of their decision together with all of the evidence on file in their office and by making an order directing further proceedings in the case by the Local Inspectors in accordance with his views. Merely reading the record in secret, without any transfer of the case and without making any formal order, naturally does not constitute an appeal. No proper steps were taken within the time limit, looking toward an appeal to the Supervising Inspector.

It is respectfully submitted that execution of the Supervising Inspector's judgment was properly enjoined, and the decree of the District Court should

be affirmed.

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